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IN THE

Supreme Court of the United States

1963

MORRIS GOTTHILF,

Petitioner,

—against—

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC.,

Respondents.

ANSWER OF RESPONDENTS TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

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Statement

The petitioner, Morris Gotthilf, has petitioned this Court that a Writ of Certiorari be issued to review the final order of the New York Supreme Court, Appellate Division, First Judicial Department, entered in the office of the Clerk of the Appellate Division on September 20, 1962, unanimously affirming without opinion an order of the Supreme Court, New York County, entered in the office of the Clerk of New York County on March 26, 1962. Opinion below.

Respondents respectfully refer this Court to petitioner's Appendix I, pages 16-17, and Appendix II, pages 17, where the memorandum opinions of the Supreme Court of the State of New York, County of New York in this matter are set forth at length.

Constitutional and Statutory Provisions Involved:

The relevant New York State statutes are reproduced on page 3 of the petition, said statutes being New York Civil Practice Act, Section 764, the New York State Civil Practice Act, Section 504, and the New York State Civil Practice Act, Section 826.

Petitioner is seeking review of Section 764 of the Civil Practice Act on the ground that its application in this case is in violation of the due process clause of the 14th Amendment of the United States Constitution.

Statement of the Case

In September, 1959, petitioner was the Chairman of the Board of Charge-It Systems, Inc., a New York corporation, which was the factor of respondent, Sills of Cambridge, Inc. Respondents Benjamin Sills and Morton Sills were the principal officers and stockholders of Sills of Cambridge, Inc.

On September 24, 1959, the respondents were indebted to the United States Government for withholding taxes collected from its employees. The individual respondents, in addition to being personally liable for the debt to the United States Government, were also the guarantors of the debt of Sills of Cambridge, Inc. to Charge-It Systems, Inc. There was a controversy between the parties as to the balance due to Charge-It Systems.

On September 24, 1959, Charge-It Systems, Inc., by its Chairman of the Board, agreed with the individual respondents that it would satisfy in full, the claim of Charge-It Systems against the respondents, if the individual defend-

ants would pay the sum of $13,000. to it, by paying $2,500. and the balance in ten equal monthly payments. The petitioner assured the respondents that he had communicated with Internal Revenue Service and had stated to it that he would satisfy the claims of Charge-It Systems against the respondents by reason of such payment of $2,500 and the ten monthly installments, and that he would collect the outstanding accounts receivables of Sills of Cambridge, Inc. and would remit to the Internal Revenue Service the collections, once a month, and would report such collections to it twice a month. This agreement was incorporated in a letter signed by the parties, including the petitioner. (Appendix I.)

The payment of $2,500. and the montly payments were all made by the individual respondents when they fell due.

The petitioner collected the acounts receivable and instead of reporting and remitting such collections to the Internal Revenue Service once a month, sent to Sills of Cambridge, Inc. what appeared to be copies of letters addressed by the petitioner to the Internal Revenue Service, remitting to it the amount of collections received during each preceding month. Actually and in fact, the copies of the letters were fraudulent. Petitioner did not remit payments to the Internal Revenue Service and, in fact, had not even approached the Internal Revenue Service with its agreement of September 24, 1959. The agreement of September 24, 1959 and the purported copies of the monthly letters were a fraudulent plan by the petitioner to obtain the sum of $13,000. from the individual respondents on the pretext that all collections of the accounts receivables would be paid to the Internal Revenue Service in reduction of its claim against the respondents.

A summons and verified complaint was served upon Charge-It Systems and the petitioner alleged in one of the causes of action an action for fraud and deceit. The defendants in that action were required to appear for an examination before trial. They deliberately defaulted. A motion was made on written notice to their attorney for an order striking their answer on the ground of their wilful and deliberate default in appearing for the examination before trial. Again, the petitioner and his co-defendant deliberately and wilfully defaulted. The motion was granted and a copy of the order entered thereon was served upon petitioner's attorney, who did nothing with regard thereto.

Thereafter, a motion was made to set the case down for an inquest before the court. This motion was also made on written notice to petitioner's counsel. Again, petitioner's counsel deliberately defaulted.

The petitioner's counsel appeared at the inquest taken on the 9th day of May, 1961, and notified the Justice Presiding that he would not take part therein and left the courtroom. The Presiding Justice heard the testimony and evidence of the respondents with regard to the fraud and deceit practiced upon them by Charge-It Systems, Inc. and petitioner and thereupon granted judgment to the respondent, Sills of Cambridge, Inc. against petitioner herein and his co-defendant, in the sum of $19,294.38, by reason of the fraud and deceit of both the petitioner and his co-defendant, ~~Sills of Cambridge, Inc.~~ CHARGE-IT SYSTEMS, INC.

An appeal was taken therefrom to the Appellate Division of the State of New York, First Department, and the judgment was upheld without opinion.

An execution was issued against the property of the petitioner and his co-defendant. The execution was returned unsatisfied. Thereafter, the judgment-creditor by written notice served upon the petitioner, his former attorney, Archibald Palmer and his present attorney, O. John Rogge, brought on a motion for a body execution. The motion was heard on January 31, 1962 in the Supreme Court, New York County, Special Term, Part I by Mr. Justice Abraham J. Gellinoff presiding. Affidavits were submitted in support of said motion and the petitioner submitted three affidavits verified by him and one affidavit verified by Archibald Palmer, his former attorney. The court was not satisfied with the affidavits submitted in opposition to said motion and required the petitioner to serve an additional affidavit setting forth his financial status and future prospects, together with a plan for the payment of the judgment. (See Appendix I, page 16 annexed to the petition.)

Petitioner did, in fact, submit an additional affidavit and also requested a hearing before Mr. Justice Gellinoff. He was granted a hearing, at which time the petitioner, his attorney O. John Rogge, and Theodore Charnas the attorney for the judgment-creditor appeared.

Thereafter, the court granted respondent's application for a body attachment.

Petitioner appealed to the Appellate Division on the ground, among others, that the Section 764 of the Civil Practice Act of the State of New York was unconstitutional. The Appellate Division affirmed the decision of the lower court.

The Reasons for Denying the Writ

The New York Supreme Court had a right to issue body execution against the petitioner herein because it had extended to petitioner due process, which was rejected in part, and because the Legislature of the State of New York had set the procedure by which rights in such cases may be enforced and wrongs remedied.

> *The Hardware Dealer's Mut. Fire Ins. Co. of Wisc.* v. *Glidden Co.*, 1931, 52 S. Ct. 69, 284 U. S. 151, 76 L. Ed. 214.

The procedure prescribed by New York State for the issuance of body attachments, in cases where damages are sought for fraud and deceit, affords due process contemplated by the 14th Amendment.

Petitioner, in the New York case, had notice of every step taken in the action, which resulted in the judgment for damages for fraud and deceit. The fact that the petitioner refused to accept the due process available to him cannot afford him immunity from body attachment.

> *Mueller* v. *Powell, C. A. Mo.* 1953, 203 F. 2nd 797.

In the case of *Lipman* v. *Goebel*, 192 N. E. 203, 357 Ill. 315 certiorari was denied by this Court. 55 S. Ct. 508, 294 U. S. 712, 79 L. Ed. 1246.

The facts in *Lipman* are very similar to those in the case before this Court. In both cases, a writ of attachment was sought where a malicious tort was the basis of the action.

CONCLUSION

Petitioner's writ of certiorari should be denied because Section 764 of the Civil Practice Act of the State of New York is constitutional.

Respectfully submitted,

THEODORE CHARNAS
Attorney for Respondents
Office & P. O. Address
551 Fifth Avenue
New York 17, N. Y.

APPENDIX I

Exhibit A Annexed to Complaint

(Agreement of September 24, 1959)

[LETTERHEAD OF]

CHARGE-IT SYSTEMS, INC.
1472 Broadway
New York 36, N. Y.

September 24, 1959

Messrs. Morton Sills and Benjamin Sills
9 East 48th Street
New York 17, New York
Gentlemen:

Re: Sills of Cambridge, Inc.

On September 22, 1959, we have submitted to the Internal Revenue Service the settlement arrangement between ourselves. The following is a verbatim copy of the settlement agreed to between us and submitted to the Internal Revenue Service:

> "We have today arranged with Morton Sills and Benjamin Sills personally, to accept on their behalf in full payment for their indebtedness to us, under their personal guaranty, $13,000.00 payable as follows:
>
> | | | |
> |---|---|---|
> | Cash | $2,500.00 | |
> | Their notes with interest | $10,500.00 | (Payable monthly) |
>
> Sills represent and warrant that these funds are not and will not be corporate funds or collections from accounts receivable.

Exhibit A Annexed to Complaint

We will continue to collect the outstanding accounts receivable and report to you such collections twice a month, and remit to you such collections once a month. After the above referred-to personal notes of $10,500.00 and 6% interest are paid in full, we will give a general release to Sills of Cambridge, Inc. and the Individuals, and we will turn over to you all of the upaid accounts receivable that we hold as collateral.

The condition of the account as of today is:

The corporation owes to us	$22,768.39
We hold accounts receivable as collateral to secure the above (which includes accounts of doubtful and disputed collectability)	$28,319.28

In entering into the above settlement with the Sills, or agreeing to collect from the accounts receivable and remit such collections to you, we do not waive any of our rights to the collateral we now hold, or to take any and all legal action to enforce collection against or from the accounts receivable, the above Corporation and the Sills personally, if the $10,500.00 notes and interest are not paid in full.

It is understood that as long as the monthly remittances are made to you, you will hold in abeyance further action against Sills of Cambridge, Inc. and the Sills personally.

Your acceptance of and agreement to this does not waive any of your rights that you may have to the accounts receivable collateral that we now hold."

We hereby acknowledge receipt of check for $2,500.00 subject to collection, and your 10 monthly personal notes aggregating $10,500.00.

Exhibit A Annexed to Complaint

Very trully yours,

CHARGE-IT SYSTEMS, INC.

M. H. GOTTHILF
Morris H. Gotthilf, Chairman
of Board of Directors

MHG/sg

Consented, agreed to and accepted
BENJAMIN SILLS
MORTON SILLS